

**James Madison to Edward Livingston, July 10, 1822.
Includes note to John Livingston dated July 11,
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TO EDWARD LIVINGSTON. MAD. MSS.

Montpr., July 10, 1822

Dr Sir, I was favored some days ago with your letter of May 19, accompanied by a copy of your Report to the Legislature of the State on the subject of a penal Code.¹

¹ Livingston's famous Report of the Plan of the Penal Code had just been published in New Orleans.

I should commit a tacit injustice if I did not say that the Report does great honor to the talents and sentiments of the Author. It abounds with ideas of conspicuous value and presents them in a manner not less elegant than persuasive.

The reduction of an entire code of criminal jurisprudence, into statutory provisions, excluding a recurrence to foreign or traditional codes, and substituting for technical terms, more familiar ones with or without explanatory notes, cannot but be viewed as a very arduous task. I sincerely wish your execution of it may fulfil every expectation.

I cannot deny, at the same time, that I have been accustomed to doubt the practicability of giving all the desired simplicity to so complex a subject, without involving a discretion,

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inadmissible in free Govt. to those who are to expound and apply the law. The rules and usages which make a part of the law, tho' to be found only in elementary treatises, in respectable commentaries, and in adjudged cases, seem to be too numerous & too various to be brought within the requisite compass; even if there were less risk of creating uncertainties by defective abridgments, or by the change of phraseology.

This risk wd. seem to be particularly incident to a substitution of new words & definitions for a technical language, the meaning

of which had been settled by long use and authoritative expositions. When a technical term may express a very simple idea, there might be no inconveniency or rather an advantage in exchanging it for a more familiar synonyme, if a precise one could be found. But where the technical terms & phrases have a complex import, not otherwise to be reduced to clearness & certainty, than by practical applications of them, it might be unsafe to introduce new terms & phrases, tho' aided by brief explanations. The whole law expressed by single terms, such as "trial by jury, evidence, &c, &c." fill volumes, when unfolded into the details which enter into their meaning.

I hope it will not be thought by this intimation of my doubts I wish to damp the enterprize from which you have not shrunk. On the contrary I not only wish that you may overcome all the difficulties which occur to me; but am persuaded that if compleat success shd. not reward your labors, there is ample room for improvements in the criminal jurisprudence of Louisiana as elsewhere which are well worthy the exertion of your best powers, and wh will furnish useful examples to other members LC of the Union. Among the advantages distinguishing our compound Govt. it is not the least that it affords so many opportunities and chances in the local Legislatures, for salutary innovations by some, which may be adopted by others; or for important experiments, which, if unsuccessful, will be of limited injury, and may even prove salutary as beacons to others. Our political system is found also to have the happy merit of exciting a laudable emulation among the States composing it, instead of the enmity marking competitions among powers wholly alien to each other.

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I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace. This has always been a favorite principle with me; and it was not with my approbation, that the deviation from it took place in Congs., when they appointed Chaplains, to be paid from the Natl. Treasury. It would have been a much better proof to their Constituents of their pious feeling if the members had contributed for the purpose, a pittance from their own pockets. As the precedent is not likely to be rescinded, the best that can now be done, may be to apply to the Constn. the maxim of the law, *de minimis non curat*.

There has been another deviation from the strict principle in the Executive Proclamations of fasts & festivals, so far, at least, as they have spoken the language of *injunction*, or have lost sight of the equality of *all* religious sects in the eye of the Constitution. Whilst I was honored with the Executive Trust I found it necessary on more than one occasion to follow the example of predecessors. But I was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or rather mere *designations* of a day, on which all who thought proper might *unite* in consecrating it to religious purposes, according to their own faith & forms. In this sense, I presume you reserve to the Govt. a right to *appoint* particular days for religious worship throughout the State, without any penal sanction *enforcing* the worship. I know not what may be the way of thinking on this subject in Louisiana. I should suppose the Catholic portion of the people, at least, as a small & even unpopular sect in the U. S., would rally, as they did in Virga. when religious liberty was a Legislative topic, to its broadest principle. Notwithstanding the general progress made within the two last centuries in favour of this branch of liberty, & the full establishment of it, in some parts

of our Country, there remains in others a strong bias towards the old error, that without some sort of alliance or coalition between Govt. & Religion neither can be duly supported. Such indeed is the tendency to such a coalition, and such its corrupting influence on

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both the parties, that the danger cannot be too carefully guarded agst. And in a Govt. of opinion, like ours, the only effectual guard must be found in the soundness and stability of the general opinion on the subject. Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & Govt. will both exist in greater purity, the less they are mixed together. It was the belief of all sects at one time that the establishment of Religion by law, was right & necessary; that the true religion ought to be established in exclusion of every other; And that the only question to be decided was which was the true religion. The example of Holland proved that a toleration of sects, dissenting from the established sect, was safe & even useful. The example of the Colonies, now States, which rejected religious establishments altogether, proved that all Sects might be safely & advantageously put on a footing of equal & entire freedom; and a continuance of their example since the declaration of Independence, has shewn that its success in Colonies was not to be ascribed to their connection with the parent Country. If a further confirmation of the truth could be wanted, it is to be found in the examples furnished by the States, which have abolished their religious establishments. I cannot speak particularly of any of the cases excepting that of Virga. where it is impossible to deny that Religion prevails with more zeal, and a more exemplary priesthood than it ever did when established and patronised by Public authority. We are teaching the world the great truth that Govts. do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of Govt.

My pen I perceive has rambled into reflections for which it was not taken up. I recall it to the proper object of thanking you for your very interesting pamphlet, and of tendering you my respects and good wishes.

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J. M. presents his respects to Mr. [Henry B(?)]. Livingston and requests the favor of him to forward the above inclosed letter to N. Orleans or to retain it as his brother may or may not be expected at N. York.